

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

EVAN PARENT, an individual on  
behalf of himself, a class of persons  
similarly situated, and the general  
public,

Plaintiff,

v.

MILLERCOORS LLC, a Delaware  
Limited Liability Company authorized  
to do business in California, and  
DOES 1-50, inclusive,

Defendant.

CASE NO. 3:15-cv-1204-GPC-WVG

**NOTICE OF TENTATIVE RULING  
ON DEFENDANT MILLERCOORS'  
MOTION TO DISMISS**

[ECF No. 6]

Before the Court is Defendant MillerCoors LLC (“Defendant” or “MillerCoors”)’s Motion to Dismiss. Def. Mot. Dismiss (“Def. Mot.”), ECF No. 6. The motion has been fully briefed. Pl. Resp., ECF No. 7; Def. Reply, ECF No. 12. Upon consideration of the moving papers and the applicable law, the Court issues the following tentative rulings in advance of the hearing scheduled for October 23, 2015.

**FACTUAL BACKGROUND**

The facts of this case concern “Blue Moon,” a popular brand of Belgian-style wheat beer owned by Defendant MillerCoors. MillerCoors is a major beer manufacturer with many well-known beer brands, including Coors Light, Miller Genuine Draft,

1 Miller High Life, Milwaukee's Best, Hamm's, Icehouse, Olde English, and Keystone.  
 2 Compl. 14, ECF No. 1.<sup>1</sup> Plaintiff Evan Parent ("Plaintiff"), a "beer aficionado and  
 3 home brewer," alleges that from 2011 until mid-2012, he regularly paid a price  
 4 premium purchasing Blue Moon beer from San Diego-area retailers for personal and  
 5 family consumption because MillerCoors created the deceptive and misleading  
 6 impression that Blue Moon is a "craft beer." *Id.* at 15.

7 According to Plaintiff, Blue Moon does not qualify as a "craft beer" because  
 8 such beers are produced by "small, independent and traditional" craft breweries as  
 9 defined by the Brewers Association, a trade organization for American craft brewers,  
 10 and MillerCoors is not such a brewery. *Id.* at 15. More specifically, according to the  
 11 Brewers Association, "[t]o qualify as an American craft brewer, a brewery must: (a)  
 12 Produce less than 6 million barrels of beer annually; (b) Be less than 25 percent owned  
 13 or controlled by a non-craft brewer; and (c) Make beer using only traditional or  
 14 innovative brewing ingredients." *Id.* Plaintiff alleges that MillerCoors produces more  
 15 than 76 million barrels of beer on an annual basis. *Id.*

16 Plaintiff alleges that even though Blue Moon is not really a craft beer,  
 17 MillerCoors engages in deceptive and misleading business practices to misrepresent  
 18 it as a craft beer in order to capture a slice of the burgeoning craft beer market and  
 19 "charge up to 50% more for Blue Moon beer than it charges for other MillerCoors  
 20 products."<sup>2</sup> *Id.* at 15–16.

21 First, Plaintiff alleges that "Defendant goes to great lengths to disassociate Blue  
 22 Moon beer from the MillerCoors name." *Id.* at 15. Even though Blue Moon is owned  
 23 by MillerCoors, MillerCoors' ownership of Blue Moon is not disclosed on the bottle  
 24 or the outer packaging of Blue Moon beers, which instead states that the product is  
 25 manufactured by "Blue Moon Brewing Co." *Id.* In fact, Blue Moon is brewed by

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26  
 27 <sup>1</sup> All page numbers cited refer to the pagination created by the CM/ECF system, not parties' original page numbers.

28 <sup>2</sup> "On average, a six pack of craft beer typically costs \$2.00 to \$3.00 more than a six pack of macrobrewed, or mass produced beer." Compl. 14.

1 MillerCoors at its Golden, Colorado, and Eden, North Carolina breweries, which also  
 2 produce all of MillerCoors' other beers. Compl. 15. The Blue Moon Brewing Company  
 3 ("BMBC") website also contains no reference to MillerCoors' ownership of the brand,  
 4 although MillerCoors' own website lists Blue Moon among its "craft beer" brands. *Id.*  
 5 Second, Plaintiff argues that Defendant's use of the registered trademark "Artfully  
 6 Crafted" in the labeling and advertising for Blue Moon beer misleads consumers into  
 7 thinking Blue Moon is a craft beer. Compl. 16. Third, Plaintiff argues that Blue Moon's  
 8 "premium price," in line with other craft beers, as well as its "placement among other  
 9 craft beers" in San Diego-area retailers, misled him into believing Blue Moon was a  
 10 craft beer. *Id.*

### 11 **PROCEDURAL BACKGROUND**

12 On April 24, 2015, Plaintiff, a resident of California, brought suit on behalf of  
 13 himself and others similarly situated against Defendant, a limited liability company  
 14 incorporated in Delaware and with its principal place of business in Illinois, in San  
 15 Diego Superior Court. *Id.* at 12. Plaintiff pled three causes of action for (1) deceptive  
 16 practices and misrepresentation in violation of California's Consumers Legal Remedies  
 17 Act ("CLRA"), Cal. Civ. Code § 1750 *et seq.*; (2) untrue and misleading advertising  
 18 in violation of California's False Advertising Law ("FAL"), Cal. Bus. & Prof. Code  
 19 § 17500 *et seq.*; and (3) unlawful, fraudulent and unfair business practices in violation  
 20 of California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200 *et*  
 21 *seq.*

22 On May 30, 2015, Defendant removed the case to federal court pursuant to the  
 23 Class Action Fairness Act, 28 U.S.C. § 1332(d). Compl. 3. This motion followed.

### 24 **LEGAL STANDARD**

25 A Rule 12(b)(6) dismissal may be based on either a "lack of a cognizable legal  
 26 theory' or 'the absence of sufficient facts alleged under a cognizable legal theory.'" *Johnson v. Riverside Healthcare System, LP*, 534 F.3d 1116, 1121–22 (9th Cir. 2008)  
 27 (quoting *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990)).  
 28

## DISCUSSION

### I. Judicial Notice

“Although generally the scope of review on a motion to dismiss for failure to state a claim is limited to the Complaint, a court may consider evidence on which the complaint necessarily relies if: (1) the complaint refers to the document; (2) the document is central to the plaintiff[’s] claim; and (3) no party questions the authenticity of the copy attached to the 12(b)(6) motion.” *Daniels–Hall v. Nat’l Educ. Ass’n*, 629 F.3d 992, 998 (9th Cir. 2010) (internal quotation marks and citations omitted). Fed. R. Evid. 201(b) permits judicial notice of a fact when it is “not subject to reasonable dispute because it: (1) is generally known within the trial court’s territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” The court may take notice of such facts on its own, and “must take judicial notice if a party requests it and the court is supplied with the necessary information.” Fed. R. Evid. 201(c). The records and reports of administrative bodies are proper subjects of judicial notice, as long as their authenticity or accuracy is not disputed. *See Mack v. South Bay Beer Distribs., Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986), *overruled on other grounds by Astoria Fed. Sav. & Loan Ass’n v. Solimino*, 501 U.S. 104 (1991).

MillerCoors seeks judicial notice of the outer packaging, flat, and label of Blue Moon beer; federal trademark registrations for “Blue Moon,” “Artfully Crafted,” and “Blue Moon Brewing Company”; and MillerCoors’ Fictitious Business Name Statement for “Blue Moon Brewing Company.” Def. Mot., Exs. D, H; Def. Req. for Judicial Notice, Exs. A–D, ECF No. 6-4. Plaintiff seeks judicial notice of MillerCoors’ federal trademark registrations for “Plank Road Brewery,” “Third Shift Band of Brewers,” and “Tenth and Blake Beer Company.” Pl. Req. for Judicial Notice, Exs. 1–3, ECF No. 8.

Neither party questions the authenticity of these documents. The Court finds that these items are appropriate for judicial notice because they are matters of public record,

1 the parties do not dispute their authenticity, and they are central to Plaintiff's claims.  
 2 *See, e.g., Welk v. Beam Suntory Imp. Co.*, No. 15-cv-328-LAB-JMA, 2015 WL  
 3 5022527, at \*1–2 (S.D. Cal. Aug. 21, 2015) (taking judicial notice of label in case  
 4 concerning use of the word “handcrafted” on Jim Beam bourbon labels); *Hofmann v.*  
 5 *Fifth Generation, Inc.*, No. 14-cv-2569-JM-LB, 2015 WL5440330 (S.D. Cal. Mar. 18,  
 6 2015) (taking judicial notice of labels in case concerning the use of the words  
 7 “[h]andmade” and “[c]rafted in an [o]ld [f]ashioned [p]ot [s]till” on Tito’s Handmade  
 8 Vodka’s labels). Therefore, the Court **GRANTS** parties’ requests for judicial notice.<sup>3</sup>

## 9 **II. Motion to Dismiss**

10 Defendant argues that the case should be dismissed because (1) MillerCoors’ use  
 11 of the BMBC trade name falls within California’s “safe harbor” from liability under its  
 12 consumer protection laws; (2) MillerCoors’ trade name and trademark registrations put  
 13 Plaintiff on notice of its ownership and use of the BMBC trade name; (3) no reasonable  
 14 consumer could have been misled by MillerCoors’ use of “craft beer” and “Artfully  
 15 Crafted,” because there is no standard definition of “craft beer”; (4) Plaintiff failed to  
 16 plead his claims with the requisite specificity; and (5) Plaintiff lacks standing to pursue  
 17 injunctive relief because he has no intent to purchase Blue Moon beer in the future.  
 18 Def. Mot. 9–10.

19 Plaintiff responds that (1) the safe harbor doctrine does not apply; (2) a  
 20 reasonable consumer would not be put on notice by MillerCoors’ trademark or listing  
 21 in the fictitious business name registry; (3) the term “craft beer” is well defined, and  
 22 a reasonable consumer would be deceived by MillerCoors’ representation of Blue  
 23 Moon as a craft beer; (4) Plaintiff adequately pled his claims; and (5) Plaintiff has  
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25 <sup>3</sup> Defendant also requests judicial notice of *Pye v. Fifth Generation, Inc.*, 2015  
 26 WL 5634600 (N.D. Fla. Sept. 23, 2015). Def.’s Second Request for Judicial Notice  
 27 and Notice of Supplemental Authority, ECF No. 14. On a motion to dismiss, a court  
 28 may take judicial notice of “the existence of [another court’s] opinion, which is not  
 subject to reasonable dispute over its authenticity.” *Lee v. City of Los Angeles*, 250  
 F.3d 668 (9th Cir. 2001) (citation omitted). However, for the reasons discussed below  
 in Part II.A, the Court declines to adopt *Pye*’s reasoning as to the applicability of the  
 TTB’s COLA for Blue Moon to California’s safe harbor exception.

1 standing to pursue injunctive relief. Pl. Resp. 9–28. Plaintiff also seeks leave to amend  
2 in the event that the Court grants the motion to dismiss. Pl. Resp. 29.

3 Because the Court finds that the safe harbor doctrine does apply, and the  
4 reasonable consumer would not likely be deceived by MillerCoors’ other alleged  
5 representations, the Court **GRANTS** Defendant’s motion to dismiss. However, the  
6 Court also **GRANTS** Plaintiff leave to amend his complaint to cure the deficiencies  
7 identified below.

#### 8 **A. Safe Harbor Doctrine**

9 MillerCoors argues that Plaintiff’s UCL, CLRA, and FAL claims are barred by  
10 the safe-harbor exception to California’s consumer protection laws. Def. Mot. 11. In  
11 *Cel-Tech Communications v. Los Angeles Cellular Telephone Co.*, 20 Cal. 4th 163  
12 (1999), the California Supreme Court recognized a safe harbor under the UCL for  
13 actions that the law actually bars, or for conduct the law “clearly permit[s].” *Id.* at 183.  
14 The Court explained:

15 Although the unfair competition law’s scope is sweeping, it is not  
16 unlimited. Courts may not simply impose their own notions of the  
17 day as to what is fair or unfair. Specific legislation may limit the  
18 judiciary’s power to declare conduct unfair. If the Legislature has  
19 permitted certain conduct or considered a situation and concluded  
20 no action should lie, courts may not override that determination.

21 *Id.* at 182. The doctrine applies whether state or federal law has authorized the conduct  
22 at issue. *See Van Koenig v. Snapple Beverage Corp.*, 713 F. Supp. 2d 1066, 1074 (E.D.  
23 Cal. 2010).

24 Courts have since extended the safe harbor doctrine to CLRA and FAL claims.  
25 *See, e.g., Alvarez v. Chevron Corp.*, 656 F.3d 925, 933–34 (9th Cir. 2011) (applying  
26 safe harbor to a CLRA claim); *Ebner v. Fresh Inc.*, 2013 WL 9760035, at \*4–6 (C.D.  
27 Cal. Sept. 11, 2013) (applying safe harbor to UCL, CLRA, and FAL claims); *POM*  
28 *Wonderful LLC v. Coca Cola Co.*, 2013 WL 543361, at \*1 (C.D. Cal. Feb.13, 2013)  
(applying safe harbor to UCL and FAL claims). Regulations, as well as statutes, can  
create safe harbors. *See Davis v. HSBC Bank Nevada, N.A.*, 691 F.3d 1152, 1169 & n.8  
(9th Cir. 2012).

At issue in this case is whether existing regulation has specifically authorized MillerCoors' practice of listing the manufacturer of Blue Moon as "Blue Moon Brewing Co.," instead of as MillerCoors, on the label and packaging for Blue Moon beer, or merely failed to bar it. As *Cel-Tech* put it,

[A] plaintiff may not bring an action under the unfair competition law if some other provision bars it. That other provision must actually bar it, however, and not merely fail to allow it. In other words, courts may not use the unfair competition law to condemn actions the Legislature permits. Conversely, the Legislature's mere failure to prohibit an activity does not prevent a court from finding it unfair. Plaintiffs may not "plead around" a "safe harbor," but the safety must be more than the absence of danger.

20 Cal. 4th at 184.

MillerCoors points to two regulatory regimes that they claim authorize their labeling practices. First, the Federal Alcohol Administration Act regulates the distribution of alcoholic beverages, including beer. 27 U.S.C. § 205. Under § 205(e), the Secretary of the Treasury is charged with promulgating regulations that will "will prohibit, irrespective of falsity, such statements relating to age, manufacturing processes, analyses, guarantees, and scientific or irrelevant matters as the Secretary of the Treasury finds to be likely to mislead the consumer." *Id.* The Secretary's duties have been delegated to the TTB, which has enacted regulations specifically addressing the labeling of beer products. *See Cruz v. Anheuser-Busch, LLC*, No. 14-cv-09670-AB-ASX, 2015 WL 3561536, at \*4 (C.D. Cal. June 3, 2015) (citations omitted); 27 C.F.R. § 25.142–143. 27 C.F.R. § 25.142(a) states:

Label requirements. Each bottle of beer shall show by label or otherwise the name or trade name of the brewer, the net contents of the bottle, the nature of the product such as beer, ale, porter, stout, etc., and the place of production (city and, when necessary for identification, State).

In addition, 27 C.F.R. § 25.143(a) states:

Brewer's name. The brewer's name or trade name will be shown on each case or other shipping container of bottled beer.

Second, under Cal. Code Regs. tit. 4, § 130(a),

The name and address of any manufacturer, bottler or packager appearing upon any label of beer must be the true name and address of such person at the time of packaging of such product. The true name of a

1 manufacturer, bottler or packager shall be deemed to include a fictitious  
 2 business name for which such manufacturer, bottler or packager has duly  
 3 filed a Fictitious Business Name Statement pursuant to the provisions of  
 4 Section 17900 et seq. of the Business and Professions Code.

5 Plaintiff responds that they are not challenging MillerCoors' right to use its  
 6 fictitious business name of "Blue Moon Brewing Company," but the manner in which  
 7 MillerCoors uses it. Pl. Resp. 18. Plaintiff relies on *Schnall v. Hertz Corp.*, 78 Cal.  
 8 App. 4th 1144 (2000) and *Carney v. Verizon Wireless Telecom, Inc.*, 2010 WL  
 9 1947635 (S.D. Cal. May 13, 2010) for the proposition that a determination that the  
 10 defendant's conduct is lawful does not preclude separate claims that defendant's  
 11 conduct is unfair and fraudulent under California's consumer protection laws. Pl. Resp.  
 12 18–21.

13 The Court finds Plaintiff's reliance on these cases to be misplaced. In both  
 14 *Schnall* and *Carney*, the defendant engaged in independently fraudulent conduct that  
 15 was separable from the conduct that was specifically authorized by law. In *Schnall*,  
 16 plaintiff challenged Hertz rental car company's fuel service charge. The court found  
 17 that while Hertz's imposition of a fuel service charge was authorized by law, the  
 18 "confusing and misleading portions of the rental agreement and rental record which  
 19 purport[ed] to disclose and explain the charge" could be considered deceptive. 78 Cal.  
 20 App. 4th at 1163 ("Authorization of avoidable charges for optional services hardly  
 21 amounts to permission to mislead customers about such charges.") Similarly, in  
 22 *Carney*, plaintiff paid Verizon sales tax on the full retail price of a phone purchased on  
 23 sale after a manager informed her that "Verizon was required by California state law  
 24 to charge consumers the bundled sales tax." 2010 WL 3058106, at \*1. The court found  
 25 that while Verizon was authorized by law to *collect* the sales tax, the law did not  
 26 require that it do so. *Id.* at \*5. Hence, Verizon's inaccurate representations to the  
 27 contrary were not protected by the safe harbor doctrine. *Id.* at \*6.

28 Here, the conduct challenged by plaintiff is the same as the conduct authorized  
 by law: MillerCoors' listing of "Blue Moon Brewing Co.," rather than MillerCoors, as  
 the manufacturer on Blue Moon's bottle and packaging. *See* Pl. Resp. 19–20. 27 C.F.R.

1 §§ 25.142(a) and 25.143(a) specifically permit a beer bottle and outer packaging to  
 2 show by label or otherwise the “name or trade name” of the brewer (emphasis added).  
 3 Similarly, Cal. Code Regs. tit. 4, § 130(a) states that “[t]he true name of a  
 4 manufacturer, bottler or packager shall be deemed to include a fictitious business name  
 5 for which such manufacturer, bottler or packager has duly filed a Fictitious Business  
 6 Name Statement pursuant to the provisions of Section 17900 et seq. of the Business  
 7 and Professions Code.” MillerCoors has properly registered Blue Moon Beer Company  
 8 as a trade name in California’s Fictitious Business Name registry. *See* Def. Mot., Ex.  
 9 D. MillerCoors’ use of the Blue Moon Trading Company trade name on the Blue Moon  
 10 label is thus specifically authorized by federal and state regulations. This is thus a case  
 11 where, as the *Schnall* court put it, “the conduct found to have been lawful was precisely  
 12 the same as that claimed also to be ‘unfair’ and ‘fraudulent.’” 78 Cal. App. 4th at 1163  
 13 (citations omitted); *see also POM Wonderful LLC v. Coca Cola Co.*, 2013 WL 543361,  
 14 at \*5 (C.D. Cal. Feb. 13, 2013) (finding that the safe harbor doctrine applied where  
 15 Defendant’s labeling practices complied with FDA regulations).

16 This conclusion is reinforced when the facts in the instant case are compared to  
 17 those in other cases where courts found that the manufacturer’s labeling practices were  
 18 *not* authorized by law. In *Hofmann v. Fifth Generation, Inc.*, the district court found  
 19 the safe harbor doctrine did not apply where a vodka product was labeled as  
 20 “homemade.” 2015 WL 5440330, at \*7. The court found that no TTB regulation  
 21 specifically authorized the use of “homemade” on the vodka’s label, and that it was  
 22 “not clear that such representations are necessarily within the TTB’s regulatory  
 23 purview.” *Id.*; *see also Nowrouzi v. Maker’s Mark Distillery, Inc.*, 2015 WL 4523551,  
 24 at \*4–5 (S.D. Cal. Jul. 27, 2015) (applying the same analysis). By contrast, here, federal  
 25 regulations specifically address which brewer name is permitted to appear on a beer’s  
 26 label bottle and case or shipping containers.<sup>4</sup>

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27  
 28 <sup>4</sup> In *Hofmann*, Judge Miller also questioned the applicability of the safe harbor doctrine to  
 TTB’s certificate of label approval (“COLA”) process. 2015 WL 5440330, at \*7. In order to  
 implement C.F.R. regulations, the TTB requires industry members to obtain a COLA from the TTB

Plaintiff questions whether MillerCoors can take refuge in the safe harbor considering that “the Blue Moon Brewing Company name is trademarked for ‘Bar Services; Bar featuring Microbrewery Services; [and] Brewpub Services,’” but not the “retail sale of Blue Moon beer.” Pl. Resp. 20. However, as MillerCoors correctly points out, trade names and trademarks are distinguishable concepts. *See Self-Realization Fellowship Church v. Ananda Church of Self-Realization*, 59 F.3d 902, 908 (9th Cir. 1995). A trade name is “the name under which a business operates,” while a trademark is a “word, phrase, logo, or other graphic symbol used by a manufacturer or seller to distinguish its product or products from those of others.” *Black’s Law Dictionary* (9th ed. 2009). MillerCoors has properly registered Blue Moon Beer Company as a trade name in California’s Fictitious Business Name registry, *see* Def. Mot., Ex. D, and the C.F.R. regulations authorize labeling beers with a brewer’s “trade name,” not trademark. 27 C.F.R. §§ 25.142(a), 25.143(a).

Plaintiff’s arguments that 27 C.F.R. §§ 7.23, 7.29(a), and 7.54(a) preclude application of the safe harbor doctrine are similarly unavailing. Pl. Resp. 15–18. First, 27 C.F.R. § 7.23 states that “[n]o label shall contain any brand name, which, standing alone, or in association with other printed or graphic matter, creates any impression or inference as to the age, origin, identity, or other characteristics of the product.” However, a product’s brand name refers to a “name or symbol used by a seller or manufacturer to identify goods or services and to distinguish them from competitors’ goods or services.” *Black’s Law Dictionary* (9th ed. 2009). Since Plaintiff is not challenging the *brand name* of “Blue Moon,” but the *trade name* of “Blue Moon

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prior to the public release of the alcoholic beverage. 27 C.F.R. § 7.41(a). In *Hofmann*, defendant argued that the safe harbor doctrine necessarily applies whenever the TTB approves an alcoholic beverage’s label. 2015 WL 5440330, at \*7. However, Judge Miller characterized the COLA approval process as an “informal agency action” to which it was unclear whether the safe harbor doctrine applied. *Id.* at 7. *But see Cruz*, 2015 WL 3561536, at \*5 (considering COLA to be a formal rulemaking procedure); *Pye*, 2015 WL 5634600, at \*4 (implicitly doing the same). Judge Miller’s analysis is inapplicable here, since here, it is the C.F.R. regulations themselves, rather than the TTB’s COLA for Blue Moon, that authorizes Blue Moon’s labeling. *See also POM Wonderful*, at \*5 (finding that the safe harbor doctrine directly applied where Defendant’s labeling practices complied with FDA regulations).

Brewing Company,” this regulation does not apply. Second, 27 C.F.R. § 7.29(a) states:

Statements on labels. Containers of malt beverages, or any labels on such containers, or any carton, case, or individual covering of such containers, used for sale at retail, or any written, printed, graphic, or other material accompanying such containers to the consumer, must not contain: (1) Any statement that is false or untrue in any particular, or that, irrespective of falsity, directly, or by ambiguity, omission, or inference, or by the addition of irrelevant, scientific or technical matter, tends to create a misleading impression.

However, MillerCoors’ use of the BMBC trade name on the label is not a “statement,” but an identification of the brewer governed by the separate provisions of 27 C.F.R. §§ 25.142(a) and 25.143(a) as discussed above. Third, 27 C.F.R. § 7.54(a) states:

General prohibition. An advertisement of malt beverages must not contain: (1) Any statement that is false or untrue in any material particular, or that, irrespective of falsity, directly, or by ambiguity, omission, or inference, or by the addition of irrelevant, scientific or technical matter, tends to create a misleading impression.

Again, MillerCoors’ use of the BMBC trade name is not a “statement.”

Thus, the safe harbor doctrine applies to the extent that Plaintiff’s UCL, CRLA, and FAL claims rely on MillerCoors’ omission of their ownership interest, or their designation of BCBM as the brewer, on the label or packaging of Blue Moon beers.<sup>5</sup>

#### **B. Whether a Reasonable Consumer Could Be Deceived**

Plaintiff also alleges that the reasonable consumer would have been deceived by Defendant’s representations in: (1) intentionally omitting MillerCoors’ ownership interest on the BMBC website; (2) falsely identifying Blue Moon as a craft beer on the MillerCoors website; (3) using the “Artfully Crafted” trademark to falsely portray Blue Moon as a craft beer; and (4) pricing Blue Moon at a premium and placing it in retail stores among other craft beers. *See* Compl. 15–16.

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<sup>5</sup> Since the Court finds that the safe harbor doctrine applies to MillerCoors’ use of the BCBM trade name on Blue Moon labeling, and that a reasonable consumer would not likely be deceived by MillerCoors’ other representations, the Court does not address Defendant’s additional argument that MillerCoors’ trade name and trademark registrations put Plaintiff on constructive notice of its ownership and use of the BMBC trade name. Def. Mot. 13–15. However, the Court observes that none of the cases Defendant cites for this proposition concern consumer protection statutes. *See id.* (citing *H.S.W. Enterprises, Inc. v. Woo Lae Oak, Inc.*, 171 F. Supp. 2d 135, 143 (S.D.N.Y. 2001); *Fakhri v. U.S.*, 31 Ct. Int’l Trade 1287, 1300 (2007); *Hydrotech Systems, Ltd. v. Oasis Waterpark*, 52 Cal. 3d 988, 1001 n.8 (1991)).

1 Claims under the UCL, FAL, and CLRA that representations are misleading are  
2 governed by the “reasonable consumer” test, which asks whether “members of the  
3 public are likely to be deceived.” *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 938  
4 (9th Cir. 2008) (“The California Supreme Court has recognized that these laws prohibit  
5 not only advertising which is false, but also advertising which[,] although true, is either  
6 actually misleading or which has a capacity, likelihood or tendency to deceive or  
7 confuse the public). A likelihood of deception means that “it is probable that a  
8 significant portion of the general consuming public or of targeted consumers, acting  
9 reasonably in the circumstances, could be misled.” *Lavie v. Procter & Gamble Co.*, 105  
10 Cal.App. 4th 496, 508 (2003). Whether a business practice is deceptive generally  
11 presents a question of fact that cannot be resolved on a motion to dismiss. *See*  
12 *Williams*, 552 F.3d at 938. In rare circumstances, however, courts can conclude as a  
13 matter of law that members of the public are not likely to be deceived. *See id.* at 939.

14 First, as proof that “Defendant goes to great lengths to disassociate Blue Moon  
15 beer from the MillerCoors name,” Plaintiff offers the allegation that “there is not a  
16 single reference to MillerCoors on the Blue Moon Brewing Company website.” Compl.  
17 15. But even viewing that fact in the light most favorable to Plaintiff, in the same  
18 sentence of the Complaint, Plaintiff acknowledges that “Blue Moon is prominently  
19 displayed on the MillerCoors web site.” *Id.* The Court cannot conclude that “it is  
20 probable that a significant portion of the general consuming public . . . acting  
21 reasonably under the circumstances,” could be misled by Blue Moon’s internet  
22 presence when MillerCoors “prominently” displays Blue Moon on their own company  
23 website.

24 Second, Plaintiff alleges that the reasonable consumer is likely to be deceived  
25 by MillerCoors’ false identification of Blue Moon as a craft beer on their company  
26 website. *Id.* at 16. But by the Complaint’s own terms, knowledge of MillerCoors’  
27 ownership interest in Blue Moon would have prevented Plaintiff from considering Blue  
28 Moon as a craft beer and paying a premium price for it. *See id.* As the Complaint

1 attests, MillerCoors is a major beer manufacturer with breweries located in eight states  
 2 who produces more than 76 million barrels of beer on an annual basis. *Id.* at 15. Hence,  
 3 the Court cannot conclude that the reasonable consumer, viewing Blue Moon's  
 4 identification as a craft beer on MillerCoors' company website, could be misled into  
 5 believing that Blue Moon is an "independently brewed, hand-crafted beer" not owned  
 6 by MillerCoors. *Id.* at 16.

7 Third, Plaintiff alleges that the reasonable consumer is likely to be deceived by  
 8 MillerCoors' use of the "Artfully Crafted" trademark into thinking that Blue Moon is  
 9 a craft beer. *Id.* It should first be noted that parties dispute whether or not there is a  
 10 legal or controlling definition of a "craft beer." *Compare* Def. Mot. 18–20 *with* Pl.  
 11 Resp. 9–12. The Court declines to resolve this issue, because even assuming that there  
 12 is such a definition, Plaintiff cannot rely on it for their argument that the phrase  
 13 "Artfully Crafted" is misleading.<sup>6</sup> "[T]o be actionable as an affirmative  
 14 misrepresentation, a statement must make a specific and measurable claim, capable of  
 15 being proved false or of being reasonably interpreted as a statement of objective fact."  
 16 *Vitt v. Apple Computer, Inc.*, 469 Fed. Appx. 605, 607 (9th Cir. 2012) (internal  
 17 quotation marks omitted) (affirming finding that descriptors "mobile," "durable,"  
 18 "portable," "rugged," "built to withstand reasonable shock," "reliable," "high  
 19 performance," "high value," an "affordable choice," and an "ideal student laptop" were  
 20 "generalized, non-actionable puffery because they are 'inherently vague and  
 21 generalized terms' and 'not factual representations that a given standard has been  
 22 met'"); *see also McKinney v. Google, Inc.*, 2011 WL 3862120, at \*6 (N.D. Cal. Aug.  
 23 30, 2011) ("Although misdescriptions [sic] of specific or absolute characteristics of a  
 24 product are actionable, generalized, vague, and unspecified assertions constitute mere

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25  
 26 <sup>6</sup> Plaintiff only alleges one instance of MillerCoors explicitly stating that Blue  
 27 Moon is a "craft beer," rather than using the phrase "Artfully Crafted." This is the  
 28 allegation that Blue Moon is so identified on MillerCoors' own website. *See* Compl.  
 16. But as discussed above, by the Complaint's own terms, this representation could  
 not be misleading, since a reasonable consumer would be alerted to the fact that Blue  
 Moon is owned by MillerCoors by its being featured on the website of its corporate  
 parent.

1 puffery upon which a reasonable consumer could not rely.” (internal punctuation marks  
2 omitted) (citations omitted)).

3 Plaintiff relies on a number of cases to support the proposition that MillerCoors’  
4 use of the “Artfully Crafted” phrase is actionable. Pl. Resp. 14. However, none of them  
5 are apposite. In *Colgan v. Leatherman Tool Group, Inc.*, 135 Cal. App. 4th 663, 682  
6 (2006), the court found that the “Made in USA” statement on Leatherman’s tools was  
7 deceptive where parts of those products were manufactured outside the United States.  
8 135 Cal. App. 4th at 682. And in *Hofmann*, the court found that Fifth Generation’s  
9 representation of a vodka presumably mass-produced in automated modern stills as  
10 “‘Handmade’ in old-fashioned pot stills” could mislead a reasonable consumer. 2015  
11 WL5440330, at \*8. In both cases, the defendant made a specific claim about the  
12 method of production for a consumer product. By contrast, here, it is difficult to see  
13 how the statement that Blue Moon is “artfully crafted” is “capable . . . of being  
14 reasonably interpreted as a statement of objective fact.”

15 Plaintiff also argues that even if “[o]n their own, the terms ‘craft’ and ‘crafted’  
16 might reasonably state MillerCoors’ subjective opinion of Blue Moon beer . . . when  
17 used in conjunction with other representations about the product, the terms can  
18 reasonably be construed as having specific meaning, and are thus actionable.” Pl. Resp.  
19 11–12 (citing *Williams*, 552 F.3d at 939 n.3 (finding that use of the term “nutritious”  
20 was not mere puffery where packaging’s other features, including calling the product  
21 “fruit juice snacks,” depicting pictures of fruit, and stating that the product was made  
22 with “fruit juice and other all natural ingredients,” were deceptive); *Jou v. Kimberly-*  
23 *Clark Corp.*, 2013 WL 6491158 at \*7 (N.D. Cal. Dec. 10, 2013) (finding that use of the  
24 term “natural” in the context of the phrase “pure & natural” could mislead the  
25 reasonable consumer); *Marty v. Anheuser-Busch Cos., LLC*, 43 F. Supp. 3d 1333, 1342  
26 (S.D. Fla. 2014) (finding that the statement “German Quality” was not mere puffery  
27 when evaluated in the context of (1) other statements on cartons of Beck’s [beer], (2)  
28 allegations of the defendant’s overall marketing campaign and its efforts to maintain

1 Beck's brand identity as a German beer; (3) the statement "[b]rewed under the German  
2 Purity Law of 1516"; and (4) Beck's German heritage including its 139-year history  
3 of being brewed in Germany)). Plaintiff does not specify which other "representations  
4 about the product" they are referring to in this portion of their brief. However,  
5 elsewhere in the brief, Plaintiff argues that "MillerCoors' use of the Blue Moon  
6 Brewing Company trade name, when used in conjunction with the terms 'craft' and  
7 'crafted' misleads consumers by implying that Blue Moon is a true craft beer." Pl.  
8 Resp. 20. But since MillerCoors' use of the BCBM trade name in Blue Moon's labeling  
9 and packaging is specifically protected by the safe harbor doctrine, Plaintiff cannot  
10 argue that MillerCoors' usage of that trade name contributes to a deceptive atmosphere  
11 or context within which MillerCoors' use of the phrase "Artfully Crafted" should be  
12 evaluated.

13 Nor can Plaintiff argue that other features of Blue Moon's advertising, "its  
14 placement among other craft beers," or the "premium price [Blue Moon] commanded"  
15 either provide a deceptive context or are misleading in themselves. First, Plaintiff  
16 pleads no other features of Blue Moon's advertising. Second, Plaintiff does not allege,  
17 and provides no factual allegations from which the Court could reasonably infer, that  
18 MillerCoors has any control over where retailers place Blue Moon on their shelves.  
19 Third, Plaintiff points to no case supporting the proposition that the price of a product  
20 can constitute a representation or statement about the product. *See also Boris v. Wal-*  
21 *Mart Stores, Inc.*, 35 F. Supp. 3d 1163, 1169 (C.D. Cal. 2014) (finding that the price  
22 of a migraine medication did not constitute a representation or statement about the  
23 product that could support consumer claims against retailer under the UCL, CLRA, or  
24 FAL).

### 25 C. Injunctive Relief

26 MillerCoors argues that Plaintiff lacks standing to seek injunctive relief, because  
27 the Complaint states that Plaintiff has not purchased Blue Moon since finding out it is  
28 produced by MillerCoors in July 2012, and does not state that Plaintiff has any plans

1 to purchase Blue Moon in the future. Def. Mot. 24–28. It is well established that in  
2 order to establish standing for injunctive relief, a class plaintiff must “demonstrate a  
3 likelihood of future injury” not just to unnamed class members, but to the named  
4 plaintiff themselves. *Hodges-Durgin v. de la Vina*, 199 F.3d 1037, 1044–45 (9th Cir.  
5 1999). Plaintiff argues that there is still a likelihood of future injury because the  
6 Complaint does state that had he known that Blue Moon is a mass produced beer made  
7 by MillerCoors, he “would not have purchased Blue Moon or would have only  
8 purchased it at a lower price.” Pl. Resp. 27. In the alternative, Plaintiff argues that there  
9 is still a likelihood of future injury because “nothing prevents MillerCoors from  
10 continuing to intentionally conceal its identity in order to pass off its mass produced  
11 beers as craft beers.” Pl. Resp. 28. Neither argument is availing. First, Plaintiff’s  
12 statement in the Complaint as to whether he would have purchased Blue Moon at a  
13 lower price in the past had he known it was brewed by MillerCoors does not bear on  
14 whether Plaintiff has a future intent to purchase Blue Moon. Second, the likelihood of  
15 future injury Plaintiff must establish for the purposes of standing must relate to Blue  
16 Moon beer, not MillerCoors’ other products, since Plaintiff has made no allegations  
17 concerning any other MillerCoors product in the Complaint. *See Carrea v. Dreyer’s*  
18 *Grand Ice Cream, Inc.*, 2011 WL 159380, at \*3. Accordingly, Plaintiff is not entitled  
19 to seek injunctive relief.

20 **D. Leave to Amend**

21 Fed. R. Civ. P. 15 provides that courts should freely grant leave to amend when  
22 justice requires it. Accordingly, when a court dismisses a complaint for failure to state  
23 a claim, “leave to amend should be granted unless the court determines that the  
24 allegation of other facts consistent with the challenged pleading could not possibly cure  
25 the deficiency.” *DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992)  
26 (internal quotation marks omitted). Amendment may be denied, however, if amendment  
27 would be futile. *See id.*

28 The Court will grant Plaintiff leave to amend in order to cure the deficiencies


1 identified in the complaint. The Court does not find it impossible that the Plaintiff  
2 could allege other facts as to MillerCoors' advertising or sales practices that would  
3 support their claim that MillerCoors deceptively or misleadingly represents Blue Moon  
4 as a craft beer. However, the Court cautions that the Plaintiff cannot rely on  
5 MillerCoors' use of the BCBM trade name in Blue Moon's label or packaging for their  
6 consumer protection claims. Nor, standing alone, is MillerCoors' use of the "Artfully  
7 Crafted" trademark sufficient.

### 8 CONCLUSION

9 Counsel are advised that the Court's rulings are tentative, and the Court will  
10 entertain additional argument during the October 23, 2015 hearing.

11 **IT IS SO ORDERED.**

12  
13 DATED: October 21, 2015

14   
15 HON. GONZALO P. CURIEL  
16 United States District Judge  
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